

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

WESCAP COMPANY,

Plaintiff,

v.

AIRGAS, INC., et al.,

Defendants.

Civil Action No. 03-668

MEMORANDUM / ORDER

March 6, 2006

On May 21, 2004, Cleveland Welders Supply Company ("CWSC") filed an application for default judgment against Joseph B. Colvard, III (*See* Docket # 107). Subsequently, on April 1, 2005, the complaint in this interpleader action was amended for the second time (*See* Docket # 130). CWSC therefore filed a new application for default judgment (*See* Docket # 137). Because of the filing of the second amended complaint, this court, by order dated August 8, 2005, dismissed as moot CWSC's May 21, 2004 application for default judgment (*See* Docket # 143).

However, apparently after it had filed its new application for default judgment, CWSC discovered that the second amended complaint was never served on Mr. Colvard. This is because, according to counsel for CWSC and Wescap, service on Mr. Colvard was

not required under Federal Rule of Civil Procedure 5(a), as he was a party in default for failure to appear, and the second amended complaint asserted no new claims against him. CWSC's new application for default judgment based on the second amended complaint cannot be granted since the party against whom default judgment is sought was never served with the second amended complaint. That application will therefore be denied.

However, because Mr. Colvard was never served with, and arguably is not entitled to be served with, the second amended complaint, the amended complaint remains live for purposes of resolving CWSC's application for default judgment against Mr. Colvard. Thus, CWSC's initial application for default judgment is not moot, and this court's order dismissing it will therefore be vacated. However, because Mr. Colvard was entitled to rely on this court's order, CWSC must re-serve Mr. Colvard with its application for default judgment.

For the foregoing reasons, it is hereby ORDERED that CWSC's second application for default judgment (Docket # 137) is DENIED. It is further ORDERED that this court's August 8, 2005 order (Docket # 143) is VACATED to the extent it dismissed CWSC's initial application for default judgment (Docket # 107).

BY THE COURT:

/s/ Louis H. Pollak

Pollak, J.